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NO: _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1984

RUFINO GONZALES,

PETITIONER

V.

THE STATE OF TEXAS,

RESPONDENT

Petition For Writ of Certiorari from
the Texas Court of Criminal Appeals

PETITION FOR CERTIORARI
CRIMINAL CASE

HOWARD A. HICKMAN
GARCIA, KILGORE & HICKMAN
607 West 14th Street
Austin, Texas 78701
(512/477-4481)

56 pp

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QUESTION PRESENTED

Did the Texas Court of Criminal Appeals err in holding that the State's alluding to an alleged extraneous offense, which did not result in final conviction, did not deny Petitioner his right to a fair trial under the Sixth and Fourteenth Amendments to the Constitution of the United States?1/

1/ The parties to the proceeding in the Texas Court of Criminal Appeals were the State of Texas by and through Alfred Walter, First Assistant State's Attorney and Rufino Gonzales, Petitioner herein.

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1984

RUFINO GONZALES,

PETITIONER

V.

STATE OF TEXAS,

RESPONDENT

PETITION FOR CERTIORARI
CRIMINAL CASE

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

OPINIONS BELOW

The opinion the the Texas Court of Appeals has not yet been reported and is attached as Appendix "A." The opinion of the Texas Court of Criminal Appeals is not yet reported but is attached as Appendix "B."

JURISDICTION

The judgment of the Texas Court of Criminal Appeals was entered January 23, 1985. A rehearing was sought, and the motion for rehearing was denied on February 20, 1985. The jurisdiction of this Court is involved under 28 U.S.C. Sect. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Sixth Amendment, United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

2. The Fourteenth Amendment, Section 1 United States Constitution, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The facts necessary to place in their setting the questions now raised can be briefly stated:

A. NATURE OF THE CASE AND PROCEDURAL HISTORY

The State, pursuant to Bill of Indictment No. 8573 issuing from the

Grand Jury of Caldwell County, Texas filed on March 30, 1981, instituted proceedings against Petitioner herein in the 207th District Court of Caldwell County for delivery of more than one-fourth ounce of marijuana. A jury was empaneled in the 207th District Court of Caldwell County, Texas, on December 7, 1981, and Petitioner was found guilty. Punishment was assessed by the jury and Petitioner was sentenced to confinement in the Texas Department of Corrections for a period of eleven (11) years from which judgment the Petitioner instituted an appeal to the Texas Court of Appeals for the Third Supreme Judicial District of Texas at Austin.

Pursuant to a transfer order, the appeal was handled by the Texas Court of

Appeals for the Ninth Supreme Judicial District at Beaumont. On January 25, 1984, the Court of Appeals rendered its decision and delivered its opinion reversing Petitioner's conviction and remanding this case back to the District Court of Caldwell County, Texas. No motion for rehearing was filed nor was there any request for en banc reconsideration. However, on March 1, 1984, the State of Texas filed a Petition for Discretionary Review by the Texas Court of Criminal Appeals.

On April 2, 1984, Petitioner herein filed a response requesting the Texas Court of Criminal Appeals to deny the State's Petition for Discretionary Review. On June 13, 1984, the State's Petition for Discretionary Review was granted by the Texas Court of Criminal Appeals. On July 12, 1984, the State

waived the filing of any brief in the Texas Court of Criminal Appeals. Petitioner filed a brief with the the Texas Court of Criminal Appeals on August 13, 1984.

On January 23, 1985, the Texas Court of Criminal appeals issued an opinion affirming the trial court and reversing the Court of Appeals. On February 7, 1985, Petitioner filed a motion for rehearing, and on February 20, 1985, the Texas Court of Criminal Appeals denied the motion for rehearing.

B. RELEVANT FACTS

Officer Ned Anderson of the Austin Police Department and Vernon Carter, an informant, apparently attempted to purchase marijuana from an individual known to Carter in Luling, Texas on February 19, 1980. This individual

suggested that Anderson and Carter contact Petitioner (R.Vol.II p.125). Petitioner allegedly sold a baggie to Officer Anderson with Vernon Carter present. (R.Vol.II p. 126). On February 20, 1980, Austin Police Department chemist, Sam Bivone, allegedly analyzed the substance in the baggie and formed the opinion that it was .46 ounce of marijuana (R.Vol.II p. 172). On March 30, 1981, an indictment was filed against Petitioner for Delivery of Marijuana (Transcript p. 2). A jury was empaneled and trial of this cause commenced on December 7, 1981 (R.Vol.II p. 213). The jury convicted Petitioner of delivery of marijuana.

During the punishment phase of Petitioner's trial, the attorney for the state asked Petitioner's wife on recross examination:

"Q. Isn't it a fact that he [the Petitioner] was charged on the 4th day of March of 1978 with delivering to Ronald Green a quantity of marijuana of over one-fourth of an ounce?"

Prior to the commencement of the trial, Petitioner had requested, through Motion in Limine, an order from the Court requiring the State to approach the bench before going into any record or prior criminal arrests which had not resulted in final conviction. The prosecution agreed to the Motion in Limine and the Motion was granted.

Immediately after the State asked the foregoing question, Petitioner objected to the question and moved for mistrial. The objection was sustained and a limiting instruction was given to the jury. The motion for mistrial was denied. The

jury subsequently assessed Petitioner's punishment at 11 years in the Texas Department of Corrections (Transcript p. 45).

ARGUMENT

THE TEXAS COURT OF CRIMINAL APPEALS ERRED IN HOLDING THAT THE LIMITING INSTRUCTION GIVEN BY THE TRIAL COURT CURED THE STATE'S ALLUDING TO ALLEGED EXTRANEOUS OFFENSES WHICH DID NOT RESULT IN FINAL CONVICTION SINCE THIS ACTION BY THE STATE DENIED PETITIONER HIS RIGHT TO A FAIR TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

The Sixth Amendment to the Constitution of the United States as made applicable to the States by the Fourteenth Amendment states in relevant parts, "In all criminal prosecutions, the accused shall enjoy the right... to be informed of the nature of the accusation...". U.S. CONST. amend. VI.

The Fourteenth Amendment of the

Constitution of the United States states in relevant part, "... nor shall any state deprive any person of life, liberty, or property, without due process of law...". U.S. CONST. amend. XIV, §1.

In the instant case during the punishment phase of Appellant's trial the State asked the Appellant's wife:

> "Q. Isn't it a fact that he [the appellant] was charged on the 4th day of March of 1978 with delivering to Ronald Green a quantity of marijuana of over one-fourth of an ounce?"

This was an allusion to an alleged extraneous offense for which the Appellant was not on trial and which was not mentioned in the indictment in this cause. Appellant had not therefore been informed of the nature and cause of this accusation.

Yet the foregoing question was framed in such terms as to imply to the jury

that the Appellant's guilt of this offense was a fact. Appellant submits that once the jury had been exposed to this question it was not possible for the jury to fairly assess the Appellant's punishment.

As Judge Teague observed in the instant case in dissent:

> Under the facts and circumstances of this case, I am unable to state that, as to the punishment that was assessed, 'all the king's horses and all the king's men can unring the bell, can forget the wound that was inflicted, or can forget the smell. See Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962).

No. 310-84, slip op. (Tex. Crim. App. 1985) (dissenting opinion p.4). Appendix "B" infra p. 48-9.

Appellant submits that under the facts of this case he is being punished for an extraneous offense of which he was not apprised by indictment or otherwise. Appellant submits that this violated his

constitutional rights to a fair trial and due process as guaranteed by the Sixth and Fourteenth amendments of the Constitution of the United States. As Judge Teague noted in dissent:

> "We, as judges on the highest appellate criminal court of this State, whose decisions are subject to review only by the Supreme Court of the United States, are, of course, concerned with guilt, innocence, and punishment in criminal cases; but of equal importance is the fact that we are commissioned by the citizens of Texas to make sure that persons who are accused of committing criminal wrongs against the State have received their constitutionally guaranteed right to a fair trial, which of course, includes guilt as well as punishment."

No. 310-84, slip op. (Tex. Crim. App. 1985) (dissenting opinion p.4). Appendix "B" infra p. 49.

As a general rule, upon a trial for one offense, evidence of another distinct and unrelated offense committed by the

defendant is not admissable. This Court recognized this rule in Boyd V. U.S. 142 U.S. 450 (1892) (hereinafter Boyd) and subsequent cases.

A number of cases have held that in particular circumstances that evidence of extraneous criminal convictions may become admissable because the evidence becomes independently admissable to show motive, intent or conspiracy. Yet in the present case Petitioner submits that since there is no independent relevancy, the general rule should be applied. This is particularly critical in that the extraneous act was not a prior conviction but merely a prior criminal charge. That evidence of a prior charge is more egregious than a previous conviction was recognized by the Fifth Circuit in Railton V. United States, 127 F.2d 691, (5th Cir. 1942).

Petitioner submits the right "to be tried upon competent evidence, and only for the offense charged" as recognized in Boyd should be held to be protected by the Sixth and Fourteenth Amendments of the Constitution the United States. To that end, the Petitioner invokes the jurisdiction of this Court.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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607 West 14th
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Howard A. Hickman

HOWARD A. HICKMAN
Bar No. 09573100

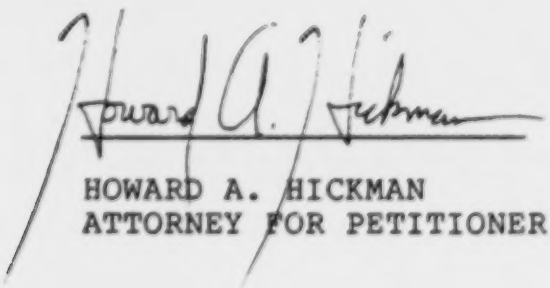
ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 18th day of April, 1985, the following have been accomplished:

(1) Forty copies of the foregoing Petition have been transmitted by Federal Express to the Clerk of the Supreme Court of the United States.

(2) Three copies of the foregoing Petition have been mailed by U.S. Mail to Alfred Walter, First Assistant State's Attorney, P.O. Box 12405, Austin, Texas 78711.



HOWARD A. HICKMAN
ATTORNEY FOR PETITIONER

APPENDIX "A"

RUFINO RODRIGUEZ GONZALES,
APPELLANT

NO. 09-83-109 CR VS.

THE STATE OF TEXAS,
APPELLEE

Appeal from Caldwell County

O P I N I O N

Appellant was indicted by a Caldwell County grand jury on March 30, 1981, for the offense of delivery of more than one-fourth ounce of marijuana, enhanced by allegations of two prior felony convictions. Appellant was found guilty by a jury, and the jury assessed his punishment at eleven years in the Texas

Department of Corrections. Appellant perfected appeal to the Court of Appeals, Third Supreme Judicial District in Austin. The Supreme Court of Texas, by order of May 4, 1983, transferred the appeal to this Court. There is no contention the evidence is insufficient to support the conviction.

Appellant's first ground of error states: "The Trial Court erred in denying Appellant's Motion for Mistrial as a result of the prosecution's introduction of arrests of the Appellant which did not result in final conviction."

Before trial, appellant filed a motion in limine which, inter alia, requested:

> "Comes now the Defendant in the above entitled and numbered cause and files this, his motion in limine and for good cause cause moves the Court to order the prosecutors

representing the State of Texas in the above entitled and numbered cause and all of the State's witnesses to refrain from mentioning or suggesting in the States voir dire and or opening statement to the jury and by question, answer, statement, objection, side bar remark or in any other manner that any of the following facts exist:

* * *

"2. Record of prior arrests of accused - Any record or prior criminal arrests which have not resulted in conviction with which the Defendant could be impeached should he take the stand to testify in his own behalf."

Appellant's attorney, after the trial began but out of the presence of the jury, requested the trial judge, inter alia,

"What we're basically asking is that prior to going into any of these matters, and also that the State instruct their witnesses not to go into these matters, until there has been a conference at the Bench to determine whether they are admissible because these matters are so prejudicial that if the jury hears them, then really a limiting instruction will not sufficiently preserve the right of the defendant from having his right to a fair trial."
(emphasis supplied)

The prosecutor replied:

> "Your honor, as long as the only requirement is that the State approach the Bench and procure a ruling, the State has no objection."

The Court announced:

> "The Motion in Limine will be granted with that understanding."

TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a) (Vernon 1981), provides:

> "Evidence of prior criminal record in all criminal cases after a finding of guilty
>
> (a) Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may be offered by the state and the defendant as to the prior criminal record of the defendant, his general reputation and his character. The term prior criminal record means a final conviction in a court of record, or a probated or suspended sentence that has occurred prior to trial, or any final conviction material to the charged." (emphasis supplied)

In the case under review, during the sentencing phase of the trial, the prosecutor, in the presence of the jury, asked a witness, "Isn't it a fact that he

[Appellant] was charged on the 4th day of March of 1978 with delivering to Ronald Green a quantity of marijuana of over one-fourth of an ounce?"

Appellant's counsel objected, and moved for a mistrial. The objection was sustained and a limiting instruction was given to the jury. The motion for mistrial was denied.

In Mullins v. State, 492 S.W.2d 277, 279 (Tex. Crim. App. 1973), the present presiding judge of our highest court of criminal appeals wrote:

> "Article 37.07, supra, limits the 'prior criminal record' to final convictions. The fact of the prior conviction and the identity of the accused as the person so convicted are the necessary elements. The statute does not permit the State to show the details of the offenses resulting in such convictions, or extraneous offenses, not resulting in final convictions." (emphasis in orginal)

See also, Ramey v. State, 575 S.W. 2d 535

(Tex. Crim. App. 1978), and Sherman v. State, 537 S.W.2d 262 (Tex. Crim. App. 1976).

The State in its brief "readily concedes that the question to the witness was an improper question subject to objection" but urges that the Court's acton in sustaining the objection and instructing the jury to disregard cured the error, citing Waller v. State, 581 S.W.2d 483 (Tex. Crim. App. 1979); Seaton v. State, 564 S.W.2d 721 (Tex. Crim. App. 1978); Granviel v. State, 552 S.W.2d 107 (Tex. Crim. App. 1976), cert. denied, 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed.2d 250 (1977); Sheppard v. State, 545 S.W.2d 816 (Tex. Crim. App. 1977); Kirkpatrick v. State, 515 S.W.2d 289 (Tex. Crim. App. 1974); Pearce v. State, 513 S.W.2d 539 (Tex. Crim. App. 1974); Guerrero v. State, 507 S.W.2d 765 (Tex.

Crim. App. 1974); Ortiz v. State, 490 S.W.2d 594 (Tex. Crim. App. 1973).

We recognize the rule directed in these cases, as indeed we must; nevertheless, here we have a situation where the judge before the trial directed that such a question not be asked before a ruling from the bench, a ruling which the State agreed to. If such rulings are to be considered "harmless" when violated as long as the judge properly instructs the jury, why should an appellant even request one? Our answer is that the same in his case was harmful, and we, therefore, sustain this ground of error and reverse and remand this case.

Reversed and Remanded.

Martin Dies, Jr.
Chief Justice

Opinion delivered
January 25, 1984
Publish.

EXHIBIT "B"

RUFINO RODRIGUEZ GONZALES,
APPELLANT

NO. 310-84 VS.

THE STATE OF TEXAS,
APPELLEE

Petition of Discretionary Review from the Court of Appeals, Ninth Supreme Judicial District of Texas (CALDWELL COUNTY)

OPINION ON STATE'S PETITION FOR DISCRETIONARY REVIEW

This is an appeal from a conviction for delivery of marijuana of more than one-fourth ounce. Punishment, enhanced by one prior felony conviction alleged and proved, was assessed by the jury at 11 years in the Department of Corrections.

Appellant perfected and appeal to the Austin Court of Appeals. The cause was transferred to he Beaumont Court of Appeals by order of the Supreme Court of Texas.

The Beaumont Court of Appeals

sustained appellant's first ground of error holding the trial court erred in overruling his motion for mistrial based on the prosecution's introduction of an arrest of the appellant which did not result in a final conviction. The conviction was reversed. Gonzales V. State, _____ S.W.2d_____ (Tex.App. No. 09-83-109 CR - Beaumont 1984).

The State in its petition for discretionary review urged that the error, if any, was not reversible error because the court sustained the objection to the question, the question was not answered, and the jury was instructed to disregard the question. We granted the State's petition to determine the correctness of the decision of the Court of Appeals.

Appellant's first ground of error states: "The Trial Court erred in

denying Appellant's Motion for Mistrial as a result of the prosecution's introduction of arrests of the appellant which did not result in final conviction." (Emphasis supplied.)

The mistrial motion was made at the penalty stage of the trial. At the commencement of that phase of the trial the State waived and abandoned the prior marijuana possession conviction in Guadalupe County alleged in the second paragraph of the indictment for the enhancement of punishment and proceeded on the third paragraph of the indictment alleging a prior 1977 marijuana possession conviction in Gonzales County for enhancement of punishment. Immediately thereafter the parties stipulated appellant was the same person convicted in the Gonzales County case and also the same person convicted in the

Guadalupe County case. The pen packets from said convictions were introduced without objection to support the third paragraph of the indictment and to prove appellant's "prior criminal record" under Article 37.07, V.A.C.C.P.

Subsequently appellant called his wife as a witness. She testified as to her 12-year marriage, the three children, that appellant was a good father, a good provider, etc., but acknowledged he had been to the penitentiary for marijuana possession. On cross-examination Mrs. Gonzales was asked about appellant's convictions in Guadalupe and Gonzales Counties. She wasn't sure, guessed that whatever was on "the paper" was correct.

On re-direct appellant's counsel inquired:

> "Q. Mrs. Gonzales, during the 12 years you've been married, <u>has Rufino been</u>, to your knowledge,

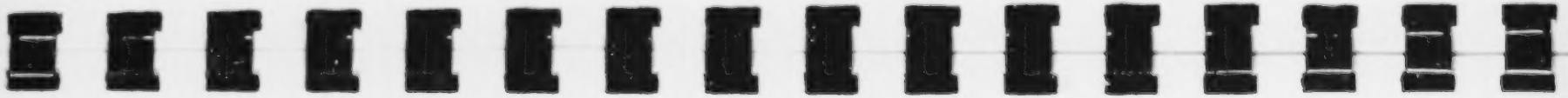
ever charged with anything other than the case that we've tried today, with just those two possessions of marijuana with -- I'm sorry. Let me rephrase it. Has he ever been convicted of anything other than those two possessions of marijuana?

"A. That's all I know about."

(Emphasis supplied.)

On re-cross-examination the prosecutor asked if she hadn't testified on direct examination she was only aware of the prior offense for which appellant went to the penitentiary and "this one" as the only offenses with which he had been charged. Upon objection "That wasn't the answer to my specific question," the prosecutor agreed to rephrase the question. The record then reflects:

"Q. Isn't it a fact that he was charged on the 4th day of March of 1978 with delivering to Ronald Green a quantity of marijuana of over one-fourth of an ounce.



"A. That he was what, convicted?"

The jury was then removed at appellant's request. His counsel states that he had rephrased his queston on re-direct, and asked about convictions, not charges. He objected to the State's question as interjecting an extraneous offense for which there was no conviction. The prosecutor responded he felt sure appellant's counsel had asked about charges. The court reporter read his notes as to the queston asked on re-direct examination. The prosecutor complained about the manner in which the question had been asked on re-direct, but re-withdrew his question on re-cross which had not been answered.[1/]

1/ It appears that the prosecutor thought appellant had "opened the door" by his queston on re-direct examination entitling the State to ask the queston it did. See Orozco v. State, 301 S.W.2d 634 (Tex.Cr.App. 1957); Heartfield v. State, 470 S.W.2d 895 (Tex.Cr.App. 1971)

The appellant asked for a "limiting instruction" and moved for a mistrial. The court agreed to give the "limiting instruction," but denied the mistrial motion. When the jury returned, the court instructed the jurors to disregard the last question of the prosecutor and the answer, if any, and not to consider them for any purpose. Mrs. Gonzales was not interrogated further.

It is here observed that at no time did appellant call the court's attention to the order granting his motion in limine, and object to the question on the basis of a violation thereof, nor did he use it as the basis for his motion for a mistrial.

The question which presents itself is whether the attempt here by the State to introduce evidenced of a "charge" without a showing of a final conviction

could be cured by the court's instruction to the jury to disregard. The State concedes the question was improper, but calls attention to the circumstances under which it was asked and withdrawn without being answered.

In White v. State, 444 S.W.2d 921 (Tex.Cr.App. 1969), this Court wrote:

> "An error in asking an improper queston or in admitting improper testimony may be generally cured or rendered harmless by a withdrawal of such testimony and an instruction to disregard the same except in extreme cases where it appears that the question or evidence is clearly calculated to inflame the minds of the jury and is of such character as to suggest the impossibility of withdrawing the impression produced on their minds. Wheeler v. State, Tex. Cr. App., 413 S.W.2d 705, 707; 5 Tex.Jur.2d, Sec. 437; McCormick and Ray, Texas Law of Evidence, Vol. 1, Sec. 29."

See also Carey v. State, 537 S.W.2d 757, 759 (Tex.Cr.App. 1976); Lovilotte v. State, 550 S.W.2d 75 (Tex.Cr.App. 1977);

Maxwell v. State, 595 S.W.2d 126 (Tex.Cr.App. 1980); Yarbrough v. State, 617 S.W.2d 221 (Tex.Cr.App. 1981); Lopez V. State 630 S.W.2d 936 (Tex.Cr.App. 1982).2/

In determining whether a jury instruction is sufficient to cure the error, the facts of each particular case must be noted. See Moffett v. State, 555 S.W.2d 437 (Tex.Cr.App. 1977). As earlier observed, the improper question was never answered, the question was withdrawn and the jury was instructed to disregard.

2/ See also Waller v. State, 581 S.W.2d 483 (Tex.Cr.App. 1979); Seaton v. State, 564 S.W.2d 721 (Tex.Cr.App. 1978); Granviel v. State, 552 S.W.2d 107 (Tex. Cr.App. 1976), cert.den. 431 U.S. 933; Sheppard V. State, 545 S.W.2d 816 (Tex. Cr.App. 1977); Kirkpatrick v. State, 515 S.W.2d 189 (Tex.Cr.App. 1974); Pearce v. State, 513 S.W.2d 539 (Tex.Cr.App.1974); Guerrero v. State, 507 S.W.2d 765 (Tex. Cr.App. 1974); Ortiz v. State, 490 S.W.2d 594 (Tex.Cr.App. 1973).

Did the mere asking of the question constitute reversible error? Courts rarely reverse a conviction of a crime solely because an improper question was asked. To cause a reversal the question must be obviously harmful to the defendent. Pearce v. State, 513 S.W.2d 539, 543 (Tex.Cr.App. 1974). The question was asked at the penalty stage of the trial under the circumstances described. The jury had already found the appellant guilty of the offense charged and the evidence was stipulated he had been twice previously convicted of two similar felonies. If the unanswered question itself was harmful, it had to be harmful on the issue of punishment. The maximum punishment for the offense charged with one prior felony conviction for enhancement of punishment would have been 20 years' imprisonment and a

possible fine of $10,000.00. The punishment assessed by the jury, however, was 11 years' imprisonment for his third-degree offense of the same nature. We cannot conclude that, given the circumstances, the question was of such character as to suggest the impossibility of withdrawing the impression produced on the minds of the jurors by an instruction to disregard. The trial court did not err in overruling the motion for mistrial.

In reversing, the Court of Appeals recognized the rule state in White, but felt the violation of the order granting the motion in limine called for a different result. The court said:

> "We recognize the rule directed in these cases, as indeed we must; nevertheless, here we have a situation where the judge before the trial directed that such a question not be asked before a ruling from the bench, a ruling which the State agreed to. If such rulings are to be considered 'harmless' when violated as long as

> the judge properly instructs the jury, why should an appellant even request one? Our answer is that the same in this case was harmful, and we, therefore, sustain this ground of error and reverse and remand this case."

No authority is cited for this holding.

The appellant filed a pre-trial motion in limine requesting, inter alia, that the State be restrained from mentioning his prior arrests which had not resulted in a conviction with which he could be impeached if he testified.

Prior to voir dire examination appellant orally asked that the State not be allowed to go into certain "matters" noted in his motion in limine until there was a bench conference to determine their admissibility because the "matters" were so prejudicial. The State had no objection if the only requirement was a bench conference and a ruling before it offered the evidence. The court granted

the motion in limine with that understanding.

At the time of the complained of question the appellant did not object on the basis of a violation of the order granting the motion in limine nor was this the basis for his mistrial motion. It would not appear appellant preserved any error on this basis for appeal. In fact, appellant's stated ground of error concerning the overruling of his motion for mistrial does not mention the ruling on the motion in limine.

What the Court of Appeals overlooked is that this Court has declared many times that the granting of a motion in limine will not preserve error. For error to be preserved with regard to the subject matter of the motion in limine it is absolutely necessary that an objection be made at the time when the subject is

raised during the trial. Thomas v. State, 477 S.W.2d 881 (Tex.Cr.App. 1972), and cases there cited; Brazzell v. State, 481 S.W.2d 130 (Tex.Cr.App. 1972); Simpson v. State, 507 S.W.2d 530 (Tex.Cr.App. 1974); Whatley v. State, 488 S.W.2d 422 (Tex. Cr. App. 1973); Harrington v. State, 547 S.W.2d 616 (Tex.Cr.App. 1977); Sheppard v. State, 545 S.W.2d 816 (Tex.Cr.App. 1977); Armitage v. State, 637 S.W.2d 936, 938 (Tex.Cr.App. 1982).

In Brazzell v. State, Supra, this Court wrote:

> "The appellant is here attempting to rely upon a motion in limine to preserve error to the admission of testimony which he contends was not admissible. Generally, a motion in limine will not preserve error to the admission of inadmissible evidence. The violation of a motion in limine3/ may entitle a party to relief, but any remedies available with regard to such a violation are with the trial court. If its order has been violated, the trial court may apply the sanctions of contempt or take

other appropriate action. But for error to be preserved on appeal with regard to the admission of inadmissible evidence objection thereto should be made at the time the evidence is offered."

In Romo v. State, 577 S.W.2d 251 (Tex.Cr.App. 1979), it was written:

"However, reliance on a motion in limine will not preserve error. A defendant must object on the proper grounds when the evidence is offered at trial. Harrington v. State, 547 S.W.2d 616 (Tex.Cr.App. 1977); Lopez v. State, 535 S.W.2d 643 (Tex.Cr.App. 1976). The reason for this rule is that a judge is often not in a position to decide on the admissibility of evidence prior to the beginning of trial. * * * Counsel could ask in the motion in limine that before a suspect area is entered into at trial, the opposing counsel be required to approach the bench and inform the court so that the jury may be excluded. By that prodecure the evidence may be challenged at the proper time without risk of prejudicing the jury. Whatever the procedure chosen, defense counsel must object before

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3/ Brazzell and other cases must be read with understanding that the Court is talking about violation of an order granting a motion in limine, not the violation of the motion which may never have been acted upon.

the evidence is admitted during trial in order to properly call the court's attention,to the matter and preserve the error for appeal."

In the instant case Appellant did object at trial and did not rely on the granting of the motion in limine. The unanswered queston was withdrawn, the jury was instructed to disregard, but the mistrial motion was denied. While recognizing the correct rule to be applied, the Court of Appeals never reached the issue of whether the harm, if any, which resulted from the mere asking of the question could have been cured by the jury instruction. Instead, it held that when he prosecutor violated the order granting the motion in limine harm resulted as a matter of law. In effect it held that "all the king's horses and all the king's men could not make things

right again."4/ In this the Court of Appeals fell into error.

The judgment of the Court of Appeals is reversed and the cause is remanded to that court for determination of appellant's other grounds of error.

ONION, Presiding Judge

Clinton, J., concurs.

(Delivered January 23, 1985)

En banc

4/ Quoted from page 4 of the State's Petition for Discretionary Review filed by the State's Prosecuting Attorney.

RUFINO RODRIGUEZ GONZALES, Appellant

NO. 310-84

THE STATE OF TEXAS, Appellee

PETITION FOR DISCRETIONARY REVIEW FROM THE COURT OF APPEALS, NINTH SUPREME JUDICIAL DISTRICT [Caldwell County]

DISSENTING OPINION

The issue that is before this Court is not whether one of the prosecuting attorneys in this cause committed error by asking an improper question; the issue, instead, is whether the error became harmless by the trial court's instruction to the jury. Try as I might, I am unable to conclude that there is not a reasonable possibility that the error in asking the improper question did not contribute to the punishment that was assessed. I, therefore, respectfully dissent.

Appellant's punishment, enhanced by

one prior felony conviction, was assessed by the jury at 11 years' confinement in the Department of Corrections. The range of punishment, as to the possible time in the penitentiary that could have been assessed, was not less than 2 years nor more than 20 years.

The record reflects that a punishment hearing was conducted after the jury found appellant guilty of delivering to another person more than one-fourth of an ounce of marijuana. The State proved up at the punishment hearing two prior felony convictions. However, only one of the convictions was used to enhance appellant's punishment. During the punishment hearing, Mr. Kilgore, the attorney for Appellant, asked the appellant's wife the following question:

"Q: Mrs. Gonzales, during the 12 years

you've been married, has Rufino been, to your knowledge, ever charged with anything other than the case that we've tried today, with just those two possessions of marijuana [sic] with -- I'm sorry. Let me rephrase it. Has he ever been convicted of anything other than those two possessions of marijuana." The witness answered: "That's all I know about."

Thereafter, on cross-examination, Mr. Blomerth, one of the prosecuting attorneys, asked the witness the following question, and she responded with the following answer: "Q: Isn't it a fact that he was charged on the 4th day of March of 1978 with delivering to Ronald Green a quantity of Marijuana [sic] of over one-fourth of an ounce? A: That he was what, convicted?"

Mr. Kilgore then objected and a

hearing outside the presence of the jury was conducted on Mr. Kilgore's motion for mistrial.

The record of the hearing reveals that not all agreed upon the wording of the question. Mr. Kilgore stated: "In my present frame of mind, I had a slight slip of tongue", "That word, (charged), may have come out of my mouth, but I immediately corrected it. . ." However, Mr. Van Horn, the other prosecuting attorney, stated to the court that he thought that the question was simply, "Are you aware of him ever being charged?" The court reporter then ascertained that the question was as we have set it out above, which does show what might perhaps be considered "a slip of the tongue." Mr. Van Horn then stated, "I thought I specifically heard the -- maybe I didn't hear him rephrase it or

maybe there was more. I'm not sure, Your Honor, but I certainly thought there was a queston asked relating to charges and not convictions. . ." Thereafter, Mr.Blomerth responded: "The defense attorney is attempting in the case -- he asked a question that both Mr. Van Horn and I clearly heard as being, has he ever been charged with such an offense, not convicted, and in the middle of his own sentence rephrases it in such a manner that perhaps he did confuse us. . . If the record reflects what has been said here, we will withdraw the question. I specifically -- and I think Mr. Van Horn [sic] asked this question in good faith and we would withdraw the question at this time."

The trial judge instructed the jury that they were not to consider the question or the answer, "for any

purpose." Mr. Blomerth also stated the following in the presence of the jury: "The State withdraws the question, Your Honor, as well and passes the witness. . ." The witness was not asked any further questions. Mr. Kilgore's motion for a mistrial was denied.

It has long been the established rule in this State that, excepting capital murder cases, the defendant is to be tried and punished upon the merits of each case, and that proof of extraneous crimes or specific acts of misconduct by the defendant are generally not admissible evidence, such becoming admissible evidence under the most limited of exceptions and conditions. Viewing the matter from hindsight, there is no queston but that Mr. Blomerth erred in asking the appellant's wife the following question, "Isn't it a fact that

he, (the Appellant), was charged on the 4th day of March of 1978 with delivering to Ronald Green a quantity of marijuana of over one-fourth of an ounce?"

However, the issue is not whether Mr. Blomerth erred, because even the State concedes that his question was improper; the issue, instead, is whether there is a reasonable possibility that the error contributed to the jury's decision to assess appellant 11 years' confinement in the penitentiary. In light of this Court's decison of Mounts v. State, 185 S.W.2d 731 (Tex.Cr.App.1945), which held that reversible error may occur solely because of an improper queston, and the cases which have followed Mounts, supra, it would be quite easy to hold that the improper question was incurable.

However, did the fact that the jury was made aware that appellant had been

previously convicted of two prior felony offenses, and had served time in the penitentiary, and the trial court instructed the jury to disregard the question and answer, cure or cause the error to become harmless? Or, was the question so prejudicial and obviously hurtful as to preclude appellant a fair and impartial punishment hearing, which the law guaranteed him? The jury was permitted to assess punishment within the range of 2 to 20 years. They chose to assess punishment at 11 years' confinement in the penitentiary. Is there a reasonable possibility that the improper question might have contributed to the jury's decision to assess punishment at 11 years' confinement in the penitentiary? Not without some difficulty, I am constrained to find that the error was incurable.

In Mounts, supra, the defendant was tried for murder. During cross-examination, the prosecuting attorney asked the defendant the following question, "On December 24, 1933, at Live Oak Cliff Boulevard at 9:15, I will ask you if you didn't have an altercation and pistol-whip a victim?" Even though the trial judge intervened before an objection was made, stating, "Here. Here. Stop that. That's improper," this Court, nevertheless, held that the queston, alone. constituted incurable error. "The question, as so framed, of and within itself, implied appellant's guilt of the misconduct inquired about and amounted, therefore, to proof of a fact, by necessary implication damaging and hurtful to appellant, that the State was not authorized to prove." (734). This Court

also held, regarding the statements of the trial judge, "he did what he could but the harm to the appellant had been done." (735).

In this instance, at a trial which occurred in 1981, appellant's wife was asked, "Isn't it a fact that he was charged on the 4th day of March of 1978 with delivering to Ronald Green a quantity of marijuana of over one-fourth of an ounce?" I believe that the average juror would have believed that this implied appellant's guilt of the misconduct inquired about and amounted, therefore, to proof of a fact, by necessary implication damaging and hurtful to appellant. Under the facts and circumstances of this case, I am unable to state that, as to the punishment that was assessed, "all the king's horses and all the king's men can

unring the bell, can forget the wound that was inflicted, or can forget the smell." See Dunn v. United States, 307F.2d 883, 886 (5th Cir.1962).

We, as judges on the highest appellate criminal court of this State, whose decisions are subject to review only by the Supreme Court of the United State, are, of course, concerned with guilt, innocence, and punishment in criminal cases; but of equal importance is the fact that we are commissioned by the citizens of Texas to make sure that persons who are accused of committing criminal wrongs against the State have received their constitutionally guaranteed right to a fair trial, which, of course, includes guilt as well as punishment.

Although I would be one of the first to agree that trials are rarely, if ever,

perfect, I must state in this instance that I am unable to say that the error was curable and that there is not a reasonable possibility that such error might have affected the jury's decision to assess appellant's punishment at 11 years' confinement in the penitentiary. Therefore, I am constrained to dissent.

TEAGUE, Judge

EN BANC

MILLER, J., joins.

DELIVERED: 1-23-85

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